

# Update

Summer 2013

## Drawing a Line in the Dirt

Here at the Bellevue Neighborhood Mediation Program (BNMP) we get a few calls about property boundary disputes. A boundary dispute typically crops up when Dick, upon examination of a map from the records office, suspects that his real boundary is five feet beyond the fence which separates his yard from Jane's. That five foot strip between the fence and the real boundary (that is, the boundary described in his deed) is called the Disputed Strip.

When Jane, confronted about the disputed strip, and distraught because moving the twenty year old fence will destroy her flower beds, calls the mediation program, she is likely to ask about adverse possession. This is one of those legal terms that many have heard of and few fully understand. To win an adverse possession claim, Jane must prove five things: (1) actual possession of the Disputed Strip for ten years; and that the possession was (2) "open and notorious"; (3) "hostile"; (4) "uninterrupted"; and (5) "exclusive."

Sound like legal gobbledygook? It is. Let me translate into plain English.

1. Actual Possession: Did Jane use the Disputed Strip like I'd expect an owner to use it?

2. Open and Notorious: Was Jane's use "open" enough for Dick to notice it?



3. Hostile: Was Jane's use the kind an owner might find objectionable? (Note: If Dick has given express permission for Jane to use the land, it is not hostile. Jane does not need to actually know the Disputed Strip is Dick's for the use to be considered hostile).

4. Uninterrupted: Did the use (Jane's and whoever owned the house before her) continue in a consistent way, without a real break in the pattern, for more than ten years?

5. Exclusive: Did Jane exclude Dick from using the area, except as a rare neighborly accommodation?

If the judge answers "Yes" to all five of those questions, Jane wins. But getting to "Yes" can be very expensive. Dick and Jane are both likely to be very interested in what the law says in this situation. But they are both more likely to find a reasonable and affordable solution through negotiation.

To learn more about Dick and Jane's boundary dispute options, please join us for the Bellevue Mediation In-Service on Property Line Disputes with City of Bellevue experts, Lacey Hatch from the City Attorney's office, and Buck Harrison from the City Surveyor's group on Wednesday, June 19<sup>th</sup> at 6:30-8:00 p.m. at Bellevue City Hall in Room 1E-118.

## Good Faith Determinations in Foreclosure Mediations

By Andrew Kidde

Professor Holdych was baiting us first year law students. Our contract's case-of-the-day turned on a clause requiring "good faith" performance of a contract. Holdych zeroed in on an anxious student, "what test does the court use to determine good faith?" The student desperately searched the text, and stammered something. Then the steel jaws of Holdych's Socratic method snapped shut: "rubbish... the judge has no test!" Holdych's view was that good faith was a well-nigh worthless term since it was far too murky and subjective for a judge to actually apply a rational standard. So much for good faith!

This exchange has been coming back to me these days, as I mediate foreclosure cases. Under the Foreclosure Fairness Act (FFA) mediators must certify whether the parties mediated in good faith. Many mediators agree that these good faith determinations are murky and subjective. Yet they are also helpful -- the threat of a finding of lack of good faith provides an important pressure on the parties to participate in these mediations in a productive manner.

In the early days of the FFA, dispute resolution center mediators were nervous about good faith determinations -- this function seemed quasi-judicial and at odds

with our role as neutral facilitators. But the Act seemed to promise that this role would simple. It included a list of things to look for: sending a person with authority and providing the necessary documents. Determining good faith was just a checklist! But it was not to be. The statute says, "A violation of the duty to mediate in good faith... may include: ..." (emphasis added) This little word, "may," means that we need to use our discretion.

And that makes sense. Good faith should not be a checklist, and it is murky because determining good faith means inferring a party's intention: did the party come to mediation intending to negotiate? Mediators cannot get inside someone's mind, we cannot really know their intention. Even if we could we would find that the party's intention is often mixed. For example, a homeowner may begin the process intending to get a modification, but may also intend to buy time by delaying the foreclosure sale date. When a party has mixed intentions, a mediator must evaluate if the intention that lacked good faith was significant enough to warrant being called out.

Finding that a borrower lacked good faith has less legal significance than finding that beneficiary lacked good faith. The FFA states that certifying "that the borrower failed to act in good faith in mediation authorizes the beneficiary to proceed with the foreclosure." But a beneficiary can also proceed with the foreclosure when the mediation ends without agreement and both were in good faith. So borrower lack-of-good-faith findings have no legal repercussion. On the other hand, finding that the beneficiary lacked good faith does -- it lets the borrower bring the foreclosure to court. These findings have clout.

Inferring the intention of a corporate beneficiary is even harder than inferring the intention of an individual borrower. The mediator can start by considering the behaviors listed in the statute -- and beneficiaries do sometimes fail to provide required documents or fail to send representatives with authority. These acts may indicate lack of good faith, or may be the result of a very large, hierarchical organization trying to comply with a dizzying array of internal and regulatory requirements and failing to attend to all of the details. A less charitable way would be to say that beneficiaries are sometimes incompetent. Incompetence is not an intention, it's not bad faith.

So, what's a mediator to do? First, wait to decide until the end of the mediation, and review all the behavior. Mediators should take a wide view of the situation. Department of Commerce guidance is also helpful. They suggest that the mediator should consider whether these lapses had "a material effect on the outcome or may have compromised the result

in any significant manner."

For example, if a borrower has little income, owes a lots of money on an expensive home, and yet still wants a modification, we are not surprised when the beneficiary denies it. If the beneficiary in such a case has failed to provide a representative with proper authority or the required documentation, the mediator should probably not conclude that the beneficiary was not in good faith. It's more likely bureaucratic failing.

The trouble comes with closer calls, when borrowers maybe should get a modification. In these cases, if the beneficiary fails to provide documents or a representative with authority, mediator should be more likely to find lack of good faith when the borrower is denied.

So, this "material effect" test suggested by the Department of Commerce requires mediators to make an assessment of the underlying merits of the foreclosure itself! Talk about a tricky assignment: "mediators, see if you can discern lack of good faith from these few behaviors, and to do that you'll probably want to make an assessment of the underlying merits of the case.... Just get it to me in 7 days okay!" So, take it easy on the mediators, and mediators, take it easy on yourself. Holdych was right, there's no easy test.

## FAREWELL TO GWEN JONES

It is with much sadness that we say goodbye to Gwen who has been a valuable part of the mediation program for the past 6 years. We will truly miss her creativity, her spirit, her organizational skills and her passion for mediation and peace.

Gwen has been coordinating the Parent-Teen Mediation Program since Cathy Goldman left and she has done a stellar job. Gwen is moving to Montana and we wish her all the very best on her new adventures.

Please come and say farewell to Gwen at the picnic on June 26th at Kelsey Creek Park. Bring your family and enjoy the food and camaraderie.

## VOLUNTEER NEWS

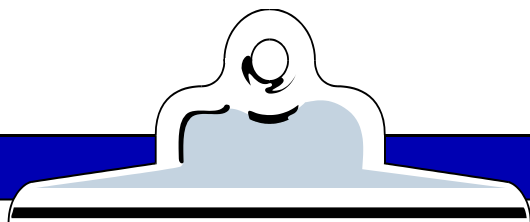
### *New Foreclosure Mediators:*

Catherine Zimmerman

Ivy Roberts

Julia Devin

Natalie Daniels



## Parent—Teen Update

By Gwen Jones

We've reached the end of another school year and we have a group of graduating seniors that will be leaving the program. We'd like to wish you all the best as you go on to the next phase of your life, and to thank you for your dedication to the program.



It is a time of big changes for many people, and I want to announce that I, too, will be leaving the program at the end of June and moving out of state. I have enjoyed working with all of you so much, and I am confident that the program will be in good hands after I leave.

The volunteer picnic will be an opportunity to say good bye and to introduce you to the people who will replace me. It will be held on Wednesday, June 26th from 4:30 to 7:30 p.m. at Kelsey Creek Park in the covered barbeque area.

Graduating seniors are invited to come and be recognized for all their hard work. All current volunteers are invited to come and reconnect — and say good bye to those who are leaving. I hope to see all of you there!

## **BNMP Training Opportunities For Mediators and Conciliators**

### *Neighborhood In-Service Training:*

#### **Property Line Disputes**

with Buck Harrison and Lacey Hatch  
Wed., June 19th from 6:30-8:00 PM  
in Room 1E-118

#### **Volunteer Picnic 2013—A potluck**

Wed., June 26th from 4:30-7:30 PM  
at Kelsey Creek Park, 410 130th Pl SE, Bellevue

- Come and meet other volunteers
- Bring your families
- Invite your friends who may wish to learn more about mediation

Please bring a dish to share! We will have burgers, hot dogs and other picnic fare! Bring bikes, frisbees & outdoor games if you want.

RSVP by email: [mediation\\_info@bellevuewa.gov](mailto:mediation_info@bellevuewa.gov) or call 425-452-4091



**Julia Devin** has joined our staff as the new Foreclosure Mediation Case Manager, taking over for Nicole Demmon who did a stellar job. Julia is a trained mediator and attorney with international and local conflict resolution experience. She has just completed the Foreclosure Mediation training and is looking forward to working with BNMP.



**Natalie Daniels** is BNMP's new program assistant, replacing Gwen Jones at the end of June. She is an experienced mediator and attorney who has worked with the program over the last four years as a conciliator and mediator. In addition, she has gone above and beyond the call of duty by assisting with trainings and special projects. Welcome Natalie!

### **Program Staff:**

Program Co-Manager:	Cheryl Cohen	-	452-5222
Program Co-Manager:	Andrew Kidde	-	452-5288
Program Assistant	Gwen Jones	-	452-2897
Foreclosure Case Manager	Julia Devin	-	452-4091

City of Bellevue website: <http://www.bellevuewa.gov>  
(Look for the Mediation Program under "Neighborhood Information")

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*Volunteer Profile:*

**Arleen Nomura**



Arleen was born in Seattle and has been a lifelong resident of the Puget Sound area. She moved to Bellevue about 20 years ago. She has a business degree from the University of Washington and worked as a computer programmer until the early 2000's. Since then, she has helped care for aging parents and tended to a plot in the Community Gardens near Larson Lake. A few years ago, Arleen saw an article about the Bellevue Neighborhood Mediation Program in a local newspaper. She inquired about the training but work requirements prevented her from pursuing the program at that time. She finally took the training in the fall of 2012 and is now volunteering as an intake conciliator. It has been a great experience for her and she feels very privileged to be a part of this organization.

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**BELLEVUE  
NEIGHBORHOOD MEDIATION PROGRAM**

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